



Legal Update

April 10, 2013

Sharing Marijuana

“Socially Sharing” marijuana amounts to simple possession and does not rise to distribution.

Commonwealth v Jackson, SJC-11319 (April 2013)

Background: During a festival in Boston, officers observed some individuals sharing a marijuana cigarette while sitting on a park bench. The officers approached the men after smelling what they detected to be the smell of marijuana. One of the men identified as Kiiyan Jackson (hereinafter referred to as “Jackson”) stood up and the officer observed a bag protruding from his pocket. At this point the officer conducted a patfrisk of Jackson and recovered a small bag of marijuana. The officers subsequently searched Jackson’s backpack because they stated it smelled of marijuana and they were unsure “how much marijuana might have been inside.” The officers recovered numerous plastic bags with the corners torn off from the backpack and further discovered a container, that had approximately, “ten small plastic bags containing a substance resembling marijuana.” The total weight of the substances was less than ounce. Jackson was arrested and filed a motion to suppress the warrantless search of his backpack, which was denied by the District Court. The Massachusetts Supreme Judicial Court transferred the case on its own initiative from the Appeals Court.

Conclusion: The SJC held that that the officers did not have probable cause to arrest Jackson when they observed him sharing a marijuana cigarette with two others, and therefore the subsequent search of the Jackson and his backpack was not justified as a search incident to a

lawful arrest. In reaching its conclusion, the Court held that there was no evidence that Jackson was about to commit the crime of marijuana distribution, G.L. c. 94C, § 32C (a). While the Commonwealth argued that the officers smelled marijuana on the backpack the Court concluded that the police did not have probable cause to believe Jackson was involved in distribution based on the observations they had made and the recovery of less than an ounce of marijuana.

The second issue the Court analyzed was whether sharing a marijuana cigarette amounted to distribution. After examining the distribution statute in conjunction with the 2008 ballot initiative, the SJC held that “social sharing of marijuana is akin to simple possession, and does not constitute the facilitation of a drug transfer from seller to buyer that remains the hallmark of drug distribution.” The observation by police of several individuals using and sharing marijuana in a social setting does not provide the police with justification to conduct a warrantless search, because social sharing of an ounce or less is not a crime. Furthermore, the Court reviewed the facts in *Fluellen* where it determined that distribution occurs when a defendant “serves as a link in the chain between supplier and consumer.” *Commonwealth v. Fluellen*, 456 Mass. 517, 524-525 (2010).

Commentary: The *Jackson* decision reaffirmed the holding in *Keefner*, which stated that police can charge a person with distribution of marijuana regardless of whether the amount is less than ounce. *Commonwealth v Keefner*, 461 Mass. 507, (2012). The SJC restated that the 2008 ballot initiative, M.G.L. c. 94C, § 32L, states that the decriminalization of small amounts of marijuana shall not "be construed to repeal or modify" the following four categories of existing laws: those concerning (1) the operation of motor vehicles "or other actions taken while under the influence of " marijuana, (2) unlawful possession of prescription forms of marijuana, (3) possession of more than one ounce of marijuana, and (4) the "selling, manufacturing or trafficking" in marijuana. However, despite its holding in *Keefner*, the SJC did not clarify whether social sharing of marijuana constituted distribution under the statute, until the *Jackson* case.